Filed 2/8/10 P. v. Alvarez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAUL OZVALDO ALVAREZ, Defendant and Appellant.	E045125 (Super.Ct.No. SWF022378) OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge. Affirmed.

Anthony E. Colombo, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton, Sharon L. Rhodes, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Raul Ozvaldo Alvarez guilty of transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and possession of methamphetamine for sale (Health & Saf. Code, § 11378). Defendant was sentenced to a total term of three years in state prison. Defendant's sole contention on appeal is that the trial court erred in denying his *Wheeler/Batson*[1] motion. We reject this contention and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

Jury voir dire occurred on December 17 and 18, 2007. During the process, and after further inquiry of additional jurors, the prosecutor exercised several peremptory challenges. Later, outside the presence of the jury, defense counsel brought a *Wheeler/Batson* motion, arguing that the prosecutor excused "three out of the four ethnic minorities" in the group of 12 who "were excluded." The trial court agreed with defense counsel that Mr. C., an African-American, Ms. C., an African-American, and Mr. L., a Hispanic, were of a minority group and requested reasons for the peremptory challenges.

---

[1] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

[2] The details of defendant's criminal conduct are not relevant to the limited issue raised in this appeal. Those details are set out in the People's brief, and we will not recount them here. Instead, we will recount only those facts and procedural background that are pertinent to the issue we must resolve in this appeal.

The following colloquy thereafter occurred between the prosecutor and the court:

"[THE PROSECUTOR]: Okay. For Mr. [C.], your Honor, he stated 'no' in reference to a—to the circumstantial evidence. When the judge asked him—I saw him several times during the voir dire process where he had his hand in his—his face, his hand in—his chin on his hand. It wasn't like he was paying attention.

"THE COURT: Okay. Let me interrupt. I thought there were times when Mr. [C.], in my opinion, appeared to be sleeping. And there were times he appeared to not be paying attention. Sometimes some people, they could close their eyes, put their hand, their head in their hand, and they are still listening. But I kind of concur with some of the observations of Counsel regarding his physical appearance."

"[THE PROSECUTOR]: Based on that, and when he said 'no' in reference to the bite on the donut under circumstantial, I had the feeling he just wasn't paying attention, didn't want to be here. And this involves circumstantial evidence as far as showing intent. And I want jurors who are going to pay attention to the process and be able to make the connection. And by him stating 'no' was—is a reason why I—I didn't want him as a juror.

"And for Ms. [C.], everybody saw when I was questioning her, when I asked if she felt it was unfair in reference to a question, and all the other jurors said, you know, they thought it was fair, the law applies equally to drug cartels, along with—along with street-level dealers, and she said she thought it was unfair if the law applies. And I asked her several times in reference to that. And in addition, she currently has a son who was in

drug treatment. And I felt there might be some sympathy towards the defendant with a son in drug treatment, along with her answers to that question whether or not it's unfair.

"That's the reasons, you Honor.

"And for Mr. [L.], I believe there's several—there's [TJ09][3] still on the panel, [TJ08], there's several others there. And we have several others ready to come up. I don't know where that's—and I had the same opinion that—that he just wasn't really being involved with the process."

Defense counsel thereafter replied by stating "[w]ith regards to Mr. [L.], again, I—he indicated . . . that he could be fair, he would listen to the Court's instructions." In regards to Ms. C., defense counsel responded, "when I questioned her whether she would consider her son's experience, she said she wouldn't use that in her decision. [¶] And I believe the Court did stress to the jurors that their position is not to be concerned with sentencing, that that's the judge's position. So I think that was stressed with Ms. [C.]" Finally, as to Mr. C., defense counsel pointed out that he too "stated he would listen to the Court's instructions, particularly when the Court pointed—and I think when I asked him—touched upon the reasonable, two reasonable interpretation instructions. He said he would agree to that instruction and listen to the evidence."

---

3 "TJ" is the court reporter's abbreviation for trial juror, a person who was ultimately impaneled on the jury.

The trial court denied the *Wheeler/Batson* motion, finding the prosecutor's reasons to be valid. The court also explained that "the challenges were not predicated upon any type of group bias" or "any motive on behalf of Counsel to exclude anybody based upon their particular race or national origin."

II

DISCUSSION

Defendant contends that he was denied his federal and state constitutional rights when the trial court erroneously denied his motion because the prosecutor failed to offer race-neutral reasons for excusing the challenged jurors.

A. *Legal Principles*

Both the federal and state Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race. (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) To resolve a *Wheeler/Batson* motion, the trial court must first determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. If such a showing is made, the prosecution must demonstrate that the peremptory challenge was exercised for a race-neutral reason. The court must determine whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the movant. (*Lenix*, at pp. 612-613.)

The party asked to explain a challenge must provide a clear and reasonably specific explanation of his or her legitimate reasons for exercising the challenges. (*Lenix*, *supra*, 44 Cal.4th at p. 613.) The justification need not support a challenge for cause, and

even a trivial reason, if genuine and neutral, will suffice. (*Ibid*.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.] Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection." (*Ibid*.) In the third stage of the *Wheeler*/*Batson* inquiry, the focus is on the credibility of the race-neutral explanations. "'Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" (*Lenix*, at p. 613, quoting *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.) "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her." (*Lenix*, at p. 613.)

Our review of the trial court's denial of a *Wheeler*/*Batson* motion is deferential, and we examine whether substantial evidence supports its conclusions. "'We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]'" (*Lenix*, *supra*, 44 Cal.4th at pp. 613- 614, quoting *People v. Burgener* (2003) 29 Cal.4th 833, 864.)

Further, it is proper to engage in comparative juror analysis on appeal. "[C]omparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Lenix*, *supra*, 44 Cal.4th at p. 622.) We must consider such evidence if the defendant relied on it and the record is sufficient to permit review of the comparison. However, our review is circumscribed; we need not consider responses by stricken panelists or seated jurors other than those identified by defendant. (*Id*. at p. 624.)

Here, the trial court impliedly found a prima facie showing had been made as to the prosecutor's challenges to prospective jurors Mr. C., Ms. C., and Mr. L., and sought the prosecutor's explanations. The People do not dispute this finding. We, therefore, proceed with the remaining two steps of our analysis.

B. *Analysis*

1. Mr. C.

The prosecutor explained he did not believe Mr. C. was "paying attention" based on his body language and his answer in reference to a circumstantial evidence

hypothetical during the voir dire process.[4] The court concurred with the prosecutor's observations as to Mr. C.'s "physical appearance" during the voir dire process. Defense counsel did not refute the prosecutor's or the court's observations of Mr. C., but instead responded that Mr. C., "like the other jurors, stated he would listen to the Court's instructions, particularly when the Court . . . touched upon the reasonable, two reasonable interpretation instructions. He said he would agree to that instruction and listen to the evidence." On this record, we must defer to the trial court's conclusion that the prosecutor's stated concerns about Mr. C. were genuine. A prosecutor may legitimately challenge a juror based on such subjective characteristics as appearance, demeanor, or body language. (*People v. Ward* (2005) 36 Cal.4th 186, 202.) The record here is more than sufficient to support the trial court's finding that the prosecutor exercised his peremptory challenge of Mr. C. in a nondiscriminatory manner and that defendant

---

[4] As to the circumstantial evidence hypothetical, the court stated: "After the conversation, the boy enters the kitchen. The mother forgot something. She follows him 30 seconds later, and she looks at the table. On the table is a partially eaten, white-powdered donut, and there are teeth marks in the donut. There are crumbs—trail of crumbs from the plate to the end of the table, down the table leg, across the floor. They go up the pant leg, crumbs on either side of his lips, white powder around his mouth. [¶] She did not see, there is no window. 'Little Heathcliff, did you bite the donut?' Little Heathcliff, 'I cannot tell a lie. I did not bite the donut.'"

The court then asked TJ03, TJ09, Mr. L., Mr. C., TJ05, TJ11, TJ06, and Ms. C. whether Little Heathcliff bit the donut. TJ03 and TJ05 responded, "No." TJ09 responded, "Yeah," Mr. L. stated, "Apparently, he did," and Mr. C. stated, "No, I couldn't prove him guilty." TJ11 stated, "Yes," and explained because of "[a]ll the evidence on his face." TJ06 and Ms. C. both replied that "Heathcliff" bit the donut. The court then explained that both direct and circumstantial evidence are acceptable means of proof and asked if they could accept that. Mr. L. said, "Yes."

therefore had not "'prov[ed] purposeful racial discrimination.'" (*People v. Stanley* (2006) 39 Cal.4th 913, 936.)

In reaching this conclusion, we reject defendant's interpretation of the prosecutor's explanation. Defendant suggests that the prosecutor excluded Mr. C. solely based on his answer to the hypothetical and attacks the sincerity of the prosecutor's stated reasons by noting that the prosecutor did not exercise peremptory challenges to the other jurors, namely TJ03 and TJ05, who had also answered in the negative to the donut hypothetical. However, in examining the prosecutor's explanation, it appears the prosecutor sought to exclude Mr. C. due to his lack of attentiveness and merely pointed out Mr. C's answer to make his point. In addition, "it is a combination of factors rather than any single one [that] often leads to the exercise of a peremptory challenge," and "[i]t should be apparent, therefore, that the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror [that] on paper appears to be substantially similar." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221.) Because a prosecutor could well conclude that a constellation of considerations warranted a peremptory excusal of Mr. C., there is no basis for disturbing the trial court's rejection of defendant's *Wheeler/Batson* motion as to prospective juror Mr. C.

2. Ms. C.

In exercising a peremptory challenge as to Ms. C., the prosecutor explained that Ms. C. thought it was unfair that the law applied equally to drug cartels and street-level drug dealers. The prosecutor also stated that he "felt there might be some sympathy

towards the defendant with a son in drug treatment." Specifically, during voir dire, the prosecutor stated: "The next is, you apply the facts to the law. The judge will give you the law. And we already went through if you disagree with law, but does everyone agree that the law should apply equally to everyone? And I always like to use an example of speeding. Do you think the law should apply equally to everybody, whether it's a cop speeding, a robber, or even a Deputy District Attorney? [¶] And to go on understanding—does everyone understand there's sometimes a difference between, like, a big-time drug cartel with thousands of kilo versus a—another type of seller of drugs, like, a street-level seller? Does everybody understand there might be a difference there? And does everybody think it's unfair that the law applies equally to both those types of sellers?" The prosecutor inquired, "Does anyone think it's unfair at all? [¶] Ms. [C.], you look kind of confused." Ms. C. responded, "I think it's unfair, but I don't know," and later explained, "I think it's unfair for the little street guy to be just the same as the cartel." During voir dire, Ms. C. also revealed that she has a son who is a recovering drug addict, but indicated to the court that she would not have any difficulty sitting on this drug-related case due to her son's past difficulties.

As defendant acknowledges, the prosecutor's reason about Ms. C.'s son was a legitimate, race-neutral basis for a challenge. Defendant however argues that the prosecutor's reliance on Ms. C.'s son's past drug use was pretextual, because TJ03 also stated his friend's daughter had committed suicide because of methamphetamine use and TJ03 had a younger brother who was in a program to recover from methamphetamine addiction. Nevertheless, the prosecutor could reasonably be concerned that Ms. C.'s

judgment might be clouded by emotional responses triggered by the facts of the case. Moreover, this was not the only reason shown in the record for challenging Ms. C. The prosecutor also noted that Ms. C. believed the law should not apply equally to street-level drug dealers and drug cartels. Despite Ms. C.'s response that she could be fair and impartial, the prosecutor apparently detected something in Ms. C.'s demeanor or manner of speaking that belied her positive spoken response. (See *People v. Jordan* (2006) 146 Cal.App.4th 232, 257 [prosecutor not required to believe juror's assertion that she could set aside her feelings about the police department].) Regardless, the proffered reasons were legitimate in the sense of being nondiscriminatory. (*Purkett v. Elem* (1995) 514 U.S. 765, 769.)

In reviewing a *Wheeler*/*Batson* issue on appeal, the "fundamental inquiry" is whether "there [is] substantial evidence to support the trial court's ruling that the prosecutor's reasons for excusing prospective jurors were based on proper grounds, and not because of the prospective jurors' membership in a protected group." (*People v. Huggins* (2006) 38 Cal.4th 175, 233.)

3. Mr. L.

In regards to Mr. L., the prosecutor explained that he had dismissed Mr. L. because he "just wasn't really being involved [in] the process." This was a legitimate, race-neutral basis for a challenge. "The prosecutor need only identify facially valid race-neutral reasons why the prospective jurors were excused. [Citations.] The explanations need not justify a challenge for cause. [Citation.] 'Jurors may be excused based on "hunches" and even "arbitrary" exclusion is permissible, so long as the reasons are not

based on impermissible group bias. [Citation.]' [Citation.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122.)

Of course, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (*People v. Reynoso* (2003) 31 Cal.4th 903, 916.) Here, even though the prosecutor's stated reason for excusing Mr. L. was less than specific, the trial court ultimately found the prosecutor's explanation credible. "'We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.]'" (*People v. Watson* (2008) 43 Cal.4th 652, 670-671, quoting *People v. Burgener*, *supra*, 29 Cal.4th at p. 864.)

Peremptory challenges may properly be based upon a juror's "'bare looks and gestures,'" or his "'body language or manner of answering questions.'" (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 917.) We, of course, have only a cold record of the oral statements and cannot determine whether Mr. L. appeared disinterested or displayed an attitude unfavorable to the People. This is why we give great deference to the trial court, which saw and heard the proceedings. (*Id*. at pp. 917-918.) If the prosecutor's reliance on such matters is belied by the court's own observations, the court can note this fact for the record. The court impliedly found that the prosecutor's reason for excusing Mr. L. was valid. Moreover, defense counsel did not dispute the prosecutor's assertion that he believed Mr. L. was not really involved in the process. Instead, defense counsel replied that Mr. L. stated he could be fair and would listen to the court's instructions. Defense counsel remained conspicuously silent and failed to point out any inconsistency in the

prosecutor's reason for excusing Mr. L. even though she was invited to comment on the prosecutor's explanations. Defendant has failed to show error.

4. Comparative Analysis

Citing *Miller-El v. Dretke, supra,* 545 U.S. at page 241, defendant argues that this court should employ comparative analysis; in other words, to compare Mr. C. and/or Mr. L. to jurors who were not excused to determine whether the prosecutor's expressed reasons were pretextual. *Miller-El v. Dretke*, *supra*, 545 U.S. 231, does not compel a different result. There, the high court held that if a prosecutor's stated reason for striking a member of a cognizable group applies equally to an "otherwise-similar" juror who is not a member of the cognizable group, then that is "evidence tending to prove purposeful discrimination to be considered on *Batson's* third step." (*Id*. at p. 241.) Here, however, it is impossible to tell whether any of the seated jurors were truly *otherwise similar* to Mr. C. and Mr. L., in terms of race and ethnicity. Nor is it possible to discern or properly evaluate why the prosecutor declined to excuse TJ03 and TJ05, despite any of their apparent similar responses to the donut hypothetical as Mr. C. on this "cold record." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1221.)

On this record, therefore, defendant's comparative analysis is unreliable and fails to demonstrate purposeful discrimination. In addition, the prosecutor had legitimate reasons for excluding the challenged jurors. Moreover, the fact that we might reasonably derive an inference of discriminatory intent from a comparative analysis does not mean that a *Wheeler*/*Batson* motion was incorrectly denied. (*Lenix, supra,* 44 Cal.4th at pp. 627-628.) Therefore, a comparative analysis does not compel a conclusion that the

trial court erred in accepting the prosecutor's stated reasons for excusing the prospective challenged jurors.

Accordingly, the trial court properly denied defendant's *Wheeler/Batson* motion.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.